No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

STATE OF NEBRASKA'S BRIEF IN OPPOSITION TO KANSAS' MOTION TO STRIKE NEBRASKA'S COUNTERCLAIM AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

DON STENBERG
Attorney General of Nebraska

DAVID D. COOKSON
Assistant Attorney General
Counsel of Record
2115 State Capitol
Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682

BARTHOLOMEW L. MCLEAY
Special Assistant Attorney General
KUTAK ROCK
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102-2186
(402) 346-6000

Attorneys for State of Nebraska

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Kansas argues that leave of this Court is required before a party to an original action may file a compulsory counterclaim with its answer. *See* Kansas Brief at 5.[1] Kansas is in error. This Court has never required a party in an original action to obtain leave before filing a counterclaim with its answer. Supreme Court Rules require leave before a party may file a bill of complaint, but no corresponding rule exists with regard to a defendant's pleading. The Federal Rules of Civil Procedure must be followed in regard to the "form of pleadings" and those rules demand a compulsory counterclaim to be filed with the answer. Because Nebraska followed established procedure of this Court in filing its compulsory counterclaim with its answer, and its counterclaim arises out of the same transaction and occurrence that is the subject matter of Kansas' claims, Kansas' Motion to Strike should be denied.

ARGUMENT

I.

NEBRASKA'S FILING OF A COMPULSORY COUNTERCLAIM WITHOUT LEAVE IS IN CONFORMITY WITH THE ACCEPTED PRACTICE OF THIS COURT

Supreme Court Rule 17 applies to original actions before this Court. Rule 17.3 requires the plaintiff in an

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[1] "Kansas Brief at ___" refers to Kansas' Motion to Strike Nebraska's Counterclaims, Brief in Support, and Motion for Appointment of Special Master filed with the Court on May 24, 1999.

original action to seek leave of the Court before filing a Bill of Complaint. *See* SUP. CT. R. 17.3 ("The initial pleading shall be preceded by a motion for leave to file "). Rule 17 does not contain a similar requirement for any pleading filed in response to the Bill of Complaint.

Supreme Court Rule 17 was amended in 1990 to **mandate** that states comply with the "form of pleadings" stated in the Federal Rules of Civil Procedure. *See* SUP. CT. R. 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules may be taken as guides") (emphasis added). An "answer" is a "pleading." *See* FED. R. CIV. P. 7(a). Under Rule 13(a) of the Federal Rules of Civil Procedure, the "form" of the answer **must** include a "counterclaim" if the answering party's claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. " FED. R. CIV. P. 13(a). Rule 13(a) does not require leave of Court before filing the counterclaim. *Id.*

The transaction and/or occurrence that is the subject matter of Kansas' claims against Nebraska is the administration and enforcement of the Republican River Compact. *See Kansas' Bill of Complaint.* Nebraska's counterclaim (with its three claims for relief) arises directly from this same transaction and/or occurrence, involves the same time period and seeks the same type of relief. Had Nebraska requested leave to file a counterclaim with its Answer, Kansas undoubtedly would have argued that Nebraska's counterclaim was compulsory, not permissive, and that Nebraska's failure to include the counterclaim in its answer constituted a waiver of its claims.

Kansas has not identified any procedural rule or controlling case law to support its position. Kansas cites only *Nebraska v. Wyoming*, 481 U.S. 1011 (1987), in which Wyoming unilaterally sought leave to file a counterclaim. It is not clear why Wyoming chose to do so. Neither Nebraska nor Wyoming briefed the matter and this Court did not find it necessary to issue an opinion addressing the procedural posture of Wyoming's motion before the Court. *Id.*

This Court has also not required – nor have other states felt obliged to file – a motion for leave to file a compulsory counterclaim in other original actions. Indeed, in *Kansas v. Colorado*, 475 U.S. 1079 (1986), the State of Colorado filed its Answer and Counterclaim to Kansas' Bill of Complaint without seeking leave of the Court. (Significantly, Kansas did not seek to strike that counterclaim.) This Court later decided Colorado's counterclaim on the merits and did not suggest any improper procedure in Colorado's failure to seek leave to file its counterclaim. *See Kansas v. Colorado*, 514 U.S. 673, 693 (1995). A similar result can be found in *Texas v. Louisiana*, 397 U.S. 931 (1970) where Louisiana filed a counterclaim without leave of this Court.

This Court has not required leave under these circumstances with good reason. Where this Court has determined that the subject matter of one state's claim against another state is so grave and substantial to warrant this Court's exclusive original jurisdiction, any counterclaim arising from the same transaction and/or

occurrence would, by definition, warrant exercise of the same jurisdiction.[2]

Kansas confuses the filing of a compulsory counterclaim with filing a motion to amend a pleading, citing *Nebraska v. Wyoming*, 515 U.S. 1 (1995) in support of its contention. In *Nebraska v. Wyoming*, Wyoming proposed to **amend** its pleadings to include four new counts in a counterclaim and five new counts in a cross-claim **eight years** after filing its answer. Similarly, Nebraska sought to amend its pleadings to include four additional counts eight years after filing its Bill of Complaint. Both parties sought to amend their pleadings pursuant to FED. R. CIV. P. 15(a), which requires leave of the Court in the absence of written consent of the opposing party. *See* FED. R. CIV. P. 15(a) ("Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party "). This Court considered Wyoming and Nebraska's requests solely by reference to this rule. *Nebraska v. Wyoming* is inapposite.

Finally, it should be noted that motions to strike are generally disfavored. *Securities and Exchange Comm'n v. Sands*, 902 F. Supp. 1149, 1165 (C. D. Cal. 1995), *aff'd* 142 F.3d 1186 (1996) ("As a general proposition, motions to strike are regarded with disfavor because [they] are often

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[2] The rule might be different with a permissive counterclaim. *See* FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim any claim against an opposing party not arising out of the subject matter of the opposing party's claim") (emphasis added). Nebraska's counterclaim is compulsory, not permissive, because it arises out of the same subject matter as Kansas' claims.

used as delaying tactics, and because of the limited importance of pleading in federal practice").

Kansas' Motion to Strike should be viewed by this Court with disfavor. Nebraska's counterclaim against Kansas is compulsory. It arises from precisely the same transaction and/or occurrence that is the subject matter of Kansas' claims against Nebraska, namely, it seeks damages for breach of contract and corresponding declaratory relief relating to the Republican River Compact. Kansas' Motion to Strike should be denied.

II.

THIS COURT SHOULD AWAIT APPOINTMENT OF A SPECIAL MASTER UNTIL IT RULES ON WHETHER THE UNITED STATES IS AN INDISPENSABLE PARTY TO THIS ACTION AS WELL AS OTHER PRELIMINARY LEGAL ISSUES

The Court should not appoint a special master. The pleadings have not been closed. Kansas has not yet filed a reply to Nebraska's counterclaim. Among other things, Nebraska has raised Kansas' failure to include an indispensable party as an affirmative defense to Kansas' complaint. *See* Nebraska's Answer and Counterclaim ¶ 28 at 5. Nebraska intends to file a motion for judgment on the pleadings for, among other things, Kansas' failure to join the United States after Kansas has filed its reply to Counterclaim. If Nebraska prevails on its motion, this action must be dismissed. *See Arizona v. California*, 298 U.S. 558, 568 (1936). Appointment of a special master thus should await a ruling by this Court on this dispositive legal issue.

Appointment of a special master should be briefly delayed for still other reasons. The entire thrust of Kansas' Complaint concerns Nebraska's use of "groundwater" that allegedly has deprived Kansas of water from the Republican River in alleged violation of the Republican River Compact. The term "groundwater" does not appear anywhere in the Republican River Compact. It can be shown with little effort – under the pleadings alone – that use of groundwater was not contemplated by the parties at the time the Republican River Compact was executed.

The United States, in its Brief as Amicus Curiae on the Motion for Leave to File Bill of Complaint ("United States Brief"), declared this to be a pivotal issue in this case and took the highly unusual step of urging this Court to immediately resolve the issue on a "Rule 12(b)(6) motion" prior to appointment of a special master. *See* United States Brief at 17 ("Specifically, we suggest that, this court grant Nebraska leave to file a motion to dismiss under Rule 12(b)(6) limited to the question of whether, as a matter of law, the Republican River Compact limits Nebraska's right to consume groundwater.").[3] The United States went on to correctly note that addressing this preliminary issue before the appointment of a special master could save considerable time and expense. *See* United States Brief at 18 ("If the

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[3] Nebraska did not file a "Rule 12(b)(6) motion" because this Court's order granting Kansas leave to file its Bill of Complaint required Nebraska to file an "answer." Because Nebraska could accomplish the same result by a motion for judgment on the pleadings, it chose not to request leave of the Court to file a Rule 12(b) motion.

Court concludes – as Nebraska has urged – that the Compact imposes no limit [on use of groundwater], then the Court can promptly dismiss the action without consuming the time and expense of appointing a Special Master").

Because the issue of groundwater use under the Republican River Compact is highly discrete, yet its impact enormous upon the outcome of this case, Nebraska likewise urges this Court to immediately resolve this issue before appointment of a special master. This is an issue that can – and should – be resolved as a matter of law on a motion for judgment on the pleadings before referring to a special master. *See United States v. Alaska*, 499 U.S. 946 (1991); 501 U.S. 1248, 1275 (1991); 503 U.S. 569 (1992).

Nebraska will commit to the Court to file a motion for judgment on the pleadings within thirty (30) days after Kansas files its reply to Nebraska's counterclaim. If, after reviewing Nebraska's brief in support of its motion for judgment on the pleadings or Kansas' response thereto, this Court decides appointment of a special master is immediately necessary, it can do so at that time. This Court may, however, concur with Nebraska and the United States that the issue of groundwater use is one of

law that should be immediately decided by this Court and not a special master.[4]

CONCLUSION

Kansas' Motion to Strike should be denied. Supreme Court Rule 17.3 requires that a motion for leave to file a complaint accompany any bill of complaint. This Court has never before applied this rule to a compulsory counterclaim filed with an answer. Nor should it. Once this Court has passed upon the substantial nature and importance of the claims stated in a Bill of Complaint, it follows that a compulsory counterclaim arising out of the same transaction and/or occurrence that is the subject matter of the Bill of Complaint should be decided by this Court as well.

Nebraska was obliged to (and did) correctly use the "form" of pleadings in the Federal Rules of Civil Procedure in filing its compulsory counterclaim with its answer. If its Motion to Strike is denied, Kansas should be ordered to file a reply within ten (10) days of notice of the order of this Court pursuant to FED. R. CIV. P. 12(a)(4)(B).

Kansas' Motion For Appointment of Special Master should similarly be denied until this Court has resolved

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[4] Notwithstanding the above, if this Court does choose to grant Kansas' Motion to Appoint Special Master, Nebraska respectfully requests that a Senior U.S. District Court Judge without prior contact or affiliation with the parties be selected by the Court.

the fundamental and preliminary issues of law in this action.

Respectfully submitted by:

DON STENBERG
Attorney General of Nebraska

DAVID D. COOKSON
Assistant Attorney General
Counsel of Record
2115 State Capitol
Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682

BARTHOLOMEW L. MCLEAY
Special Assistant to Attorney General
KUTAK ROCK
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102-2186
(402) 346-6000

Attorneys for State of Nebraska

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